

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOSEPH ANTONETTI,

Plaintiff,

v.

DWIGHT NEVEN, *et al.*,

Defendants.

Case No. 2:08-CV-01020-KJD-LRL

ORDER

Presently before the Court is Defendants' Motion for Summary Judgment (#26/27). Plaintiff filed a response in opposition (#31) to which Defendants replied (#33). Also before the Court is Plaintiff's Motion for Reconsideration (#29). Defendants filed a response in opposition (#32) to which Plaintiff replied (#34).

I. Background

Plaintiff filed his initial complaint and application to proceed in forma pauperis on August 7, 2008. The magistrate judge approved Plaintiff's application on September 4, 2008 and reserved screening of Plaintiff's initial complaint. On December 22, 2008, Plaintiff filed a Motion for Leave to File Amended Complaint (#5). On September 16, 2009, the magistrate judge granted Plaintiff's motion to amend, screened Plaintiff's proposed amended complaint and ordered it filed. The

1 magistrate properly disposed of several claims in the amended complaint and the Court denied (#23)
2 Plaintiff's motion for reconsideration of that action on May 17, 2010.

3 On September 27, 2010, the Court granted in part and denied in part Defendants' Motion to
4 Dismiss. Defendants have now moved to dismiss Plaintiff's remaining claims for Eighth
5 Amendment violations asserting inadequate dental care, inadequate exercise, poor food sanitation
6 including complaints regarding the number of sporks available on a daily basis and a claim for
7 emotional distress.

8 II. Standard for Summary Judgment

9 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
10 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
11 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.
12 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
13 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
14 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
15 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
16 587 (1986); Fed. R. Civ. P. 56(e).

17 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
18 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere
19 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit
20 or other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial.
21 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
22 issues of controversy in favor of the non-moving party where the facts specifically averred by that
23 party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n, 497
24 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345
25 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine
26 issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on "mere

1 speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th
 2 Cir. 1986). “[U]ncorroborated and self-serving testimony,” without more, will not create a “genuine
 3 issue” of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d
 4 1054, 1061 (9th Cir. 2002).

5 Summary judgment shall be entered “against a party who fails to make a showing sufficient
 6 to establish the existence of an element essential to that party’s case, and on which that party will
 7 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted
 8 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

9 III. Analysis

10 A. Dental Care

11 Under 42 U.S.C. § 1983, to maintain an Eighth Amendment claim based on prison medical
 12 treatment, an inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner,
 13 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104(1976)). The
 14 Ninth Circuit employs a two-part test of deliberate indifference requiring a plaintiff to (1) first show
 15 a “serious medical need” by demonstrating that “failure to treat a prisoner’s condition could result in
 16 further significant injury or the unnecessary and wanton infliction of pain,” and (2) the defendant’s
 17 response to the need was deliberately indifferent. McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th
 18 Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir.
 19 1997) (en banc) (citing Estelle 429 U.S. at 104) (internal quotations removed). A plaintiff may
 20 satisfy the second prong by demonstrating (1) the prison official engaged in a purposeful act or
 21 failure to respond to a prisoner’s pain or possible medical need, and (2) harm caused by the
 22 indifference. Jett, 439 F.3d at 1096 (citing McGuckin, 974 F.2d at 1060.) Indifference “may appear
 23 when prison officials deny, delay or intentionally interfere with medical treatment, or it may be
 24 shown by the way in which prison physicians provide medical care.” McGuckin, 974 F.2d at 1060.
 25 “A prisoner need not show harm was substantial; however, such would provide additional support
 26

1 for the inmate's claim that the defendant was deliberately indifferent to his needs." Jett, 439 F.3d at
2 1096.

3 In the Ninth Circuit, "mere delay of surgery, without more, is insufficient to state a claim of
4 deliberate medical indifference . . . unless the denial was harmful." Shapley v. Nevada Bd. of State
5 Prison Com'rs, 766 F.2d 404, 407 (9th Cir. 1985).

6 [A] finding that the defendant's activities resulted in "substantial" harm
7 to the prisoner is not necessary, although a finding that the inmate was
8 seriously harmed by the defendant's action or inaction tends to provide
9 additional support to a claim that the defendant was "deliberately
10 indifferent" to the prisoner's medical needs; the fact that an individual
11 sat idly by as another human being was seriously injured despite the
12 defendant's ability to prevent the injury is a strong indicium of
13 callousness and deliberate indifference to the prisoner's suffering

14 McGuckin, 974 F.2d at 1060 (internal citations removed). Once Plaintiff has established the
15 harmfulness of the delay, "it is up to the fact finder to determine whether or not the defendant was
16 'deliberately indifferent' to the prisoner's medical needs." Id. A finding that the delay in treatment
17 was an "isolated occurrence" or "isolated exception" to the inmate's overall medical treatment tends
18 to weigh against a finding of deliberate indifference. See e.g. Wood v. Housewright, 900 F.2d 1332,
19 1334 (9th Cir. 1990); Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir.1986). "On the other
20 hand, a finding that the defendant repeatedly failed to treat an inmate properly or that a single failure
21 was egregious strongly suggests that the defendant's actions were motivated by 'deliberate
22 indifference' to the prisoner's medical needs." McGuckin, 974 F.2d at 1060-61. "In sum, the more
23 serious the medical needs of the prisoner, and the more unwarranted the defendant's actions in light
24 of those needs, the more likely it is that a plaintiff has established 'deliberate indifference' on the part
25 of the defendant." Id. at 1061.

26 Plaintiff asserts and has adequately grieved the prison's failure to attend to his serious
medical needs. He has been seeking treatment for "tooth decay" since at least March 26, 2008, and
asserts that as of October 19, 2010, he has still not been treated. Prison staff need not have expert
medical training to know that once begun, tooth decay is a continual process leading to larger health

1 problems and, often, excruciating pain. While such decay may not normally be an emergency, the
2 continual delay of treatment, especially when spread over years rather than a handful of months,
3 turns “mere delay” into a potentially “substantially” harmful situation. Prison officials should know
4 that serious delays in treatment violate a patient’s Eighth Amendment rights. Therefore, qualified
5 immunity will not shield them from suit. Therefore, the Court must deny summary judgment and
6 allow discovery to determine whether the delay in treatment of Plaintiff’s cavities has resulted in
7 substantial harm. However, all claims against Defendant Jenny Statler are dismissed because
8 Plaintiff agrees that she was not personally involved in any of the claims.

9 B. Exercise Claim

10 The defense of qualified immunity is available if the official’s conduct is objectively
11 reasonable “as measured by reference to clearly established law.” Harlow v. Fitzgerald, 457 U.S.
12 800, 818 (1982). A defendant is entitled to summary judgment based on the defense of qualified
13 immunity only if, viewing the facts in the light most favorable to Plaintiff, the facts as alleged do not
14 support a claim that the defendant violated clearly established law. Mitchell v. Forsyth, 472 U.S.
15 511, 528 (1985). This is a purely legal question. Id.; see also, Wood v. Ostrander, 879 F.2d 583, 591
16 (9th Cir. 1989). Qualified immunity provides “an entitlement not to stand trial or face the other
17 burdens of litigation, conditioned on the resolution of the essentially legal question.” Mitchell, 472
18 U.S. at 526.

19 Resolving the issue of qualified immunity involves a two-step inquiry. Clement v. Gomez,
20 298 F.3d 898, 903 (9th Cir. 2002) First, the Court must determine whether “[t]aken in the light most
21 favorable to the party asserting the injury, . . . the facts alleged show the officer’s conduct violated a
22 constitutional right.” Saucier v. Katz, 533 U.S. 194, 201 (2001). A negative answer ends the
23 analysis, with qualified immunity protecting Defendants from liability. Id. “If a constitutional
24 violation occurred, a Court must further inquire whether the right was clearly established.” Clement,
25 298 F.3d at 903 (quoting Saucier, 533 U.S. at 201) (internal quotations removed). If the law did not
26

1 put the officials on notice that their conduct would be clearly unlawful, summary judgment based on
2 qualified immunity is appropriate. Saucier, 533 U.S. at 202.

3 Plaintiff was denied outdoor exercise for approximately two months while exercise cages
4 were refurbished to avoid inmates climbing into adjacent cages to attack other inmates. While
5 deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to
6 continuous and long term segregation, it is not an absolute right that automatically overrides other
7 correctional considerations such as safety. See Norwood v. Vance, 591 F.3d 1062, 1068 (9th Cir.
8 2010); Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996). Balancing the length of the deprivation
9 (approximately two months) with the need to maintain inmate safety and order, the Court finds that
10 no constitutional violation occurred, and even if the deprivation in this action was a constitutional
11 violation, prison officials are entitled to qualified immunity. See Norwood, 591 F.3d at 631 (“[w]hen
12 violence rises to unusually high levels, prison officials can reasonably believe that it was lawful to
13 temporarily restrict outdoor exercise to help bring the violence under control”); May v. Baldwin, 109
14 F.3d 557, 565 (9th Cir. 1997)(twenty-one day denial of outdoor exercise while in disciplinary
15 segregation not a sufficiently serious deprivation); Hoptowit v. Ray, 682 F.2d 1237, 1259 (9th Cir.
16 1982)(outdoor exercise may be curtailed or suspended temporarily when a genuine emergency
17 exists); Hayes v. Garcia, 461 F. Supp.2d 1198, 1201 (S.D. Cal. 2006)(ongoing violence justified
18 nine-month denial of exercise); Hurd v. Garcia, 454 F. Supp.2d 1032, 1042-45 (S.D. Cal.
19 2006)(ongoing violence justified five-month denial of exercise); Jones v. Garcia, 430 F. Supp.2d
20 1095, 1102-1103 (S.D. Cal 2006)(ongoing violence justified ten-month denial of exercise). In this
21 action, prison officials did not have notice that the two-month denial of exercise, caused by ongoing
22 inmate violence, would result in a constitutional violation, especially considering that they sought
23 reasonable alternatives for outdoor exercise. See Thomas v. Ponder, 611 F.3d 1144 (9th Cir. 2010);
24 Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000). Accordingly, Defendants’ motion for summary
25 judgment on the exercise claims is granted, because Defendants are entitled to qualified immunity.
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1 C. Food/Spork Claim

2 Defendants are also entitled to qualified immunity as to Plaintiff's claim regarding quality of
3 the food and eating utensils. Even if Plaintiff's claims were to establish a constitutional violation,
4 Defendants would be entitled to qualified immunity, because they would not be on notice that their
5 conduct violated Plaintiff's Eighth Amendment rights. See LeMaire v. Maass, 12 F.3d 1444, 1456
6 (9th Cir. 1993)(food need not be tasty or aesthetically pleasing, fact that food occasionally contains
7 foreign objects or is sometimes served cold does not amount to a constitutional deprivation); Martin
8 v. Lane, 766 F. Supp. 641 (N.D. Ill. 1991)(lack of eating utensils not constitutionally actionable).
9 Therefore, the Court grants Defendants' motion for summary judgment, because Defendants are
10 entitled to qualified immunity on this claim.

11 D. Personal Participation

12 Plaintiff has already agreed that Jenny Statler should be dismissed from this action. In
13 response to Defendants' motion seeking to dismiss Defendants Joby Aragon and Reginald Robinson
14 for lack of personal participation in the allegations of the complaint, Plaintiff could point to no
15 specific action or set of facts personally involving these defendants. Accordingly, the Court
16 dismisses all claims against Statler, Aragon and Robinson. Should discovery reveal specific facts
17 involving these defendants, Plaintiff may move to amend his complaint or add parties.

18 E. Motion for Reconsideration

19 Plaintiff's motion for reconsideration merely reargues his position in response to the motion
20 to dismiss. The Court did not commit clear error and does not have a definite and firm conviction
21 that it erred in its previous orders dismissing many of Plaintiff's claims. Accordingly, the motion for
22 reconsideration is denied.

23 IV. Conclusion

24 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment
25 (#26/27) is **GRANTED in part and DENIED in part;**
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1 IT IS FURTHER ORDERED that Defendants' motion for summary judgment on Plaintiff's
2 Eighth Amendment claim involving inadequate or delayed dental care is **DENIED**;

3 IT IS FURTHER ORDERED that all other claims (except the state law claim for emotional
4 distress) are **DISMISSED**;

5 IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration (#29) is **DENIED**;

6 IT IS FURTHER ORDERED that Plaintiff's Motions (#30/36) are **DENIED as moot**.

7 DATED this 28th day of September 2011.

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11 Kent J. Dawson
12 United States District Judge
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